Supreme Court of the United States

OCTOBER TERM, 1945

No. 1304

RICHMOND SCREW ANCHOR CO., INC.,

Petitioner,

against

J. METCALFFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

E. JOHN ERNST, JR.,
Counsel for Petitioner.

JULIUS L. GOLDSTEIN,
of Counsel.

INDEX

CASES CITED

STATUTES CITED

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Richmond Screw Anchor Co., Inc., respectfully prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, which affirmed a judgment in favor of the respondent.

Opinions Below

The opinion of the District Court is reported in 59 F. Supp. 291, and the opinion of the Second Circuit Court of Appeals, which was written for affirmance by Hon. Jerome M. Frank, bears number 186, October Term, 1945.

Jurisdiction

The jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended, 28 U. S. C. A., Section 347, et seq.

The decision of the Circuit Court of Appeals was rendered on March 8, 1945. The time to apply for this writ expires on June 8, 1946.

Questions Presented

The questions are (a) whether a purely voluntary payment by an employer to an employee, in the form of a weekly bonus, which involves no contractual obligation, is nevertheless legally part of the regular rate, as prescribed by the Fair Labor Standards Act of 1938, the employees having received hourly earnings and overtime computed thereon; (b) whether, in any case, this was a proper case for injunctive relief.

Statutes Involved

The federal statutes involved are Sections 7 and 15 of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C., Title 29, Secs. 201, *et seq.*), hereinafter called the Act. These are the relevant parts:

> "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * *
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section.

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, to sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14.

Sec. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled

'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15."

Statement

This action was commenced by the filing of a complaint against the defendant on August 6, 1943. The complaint alleges substantially that petitioner was engaged in the production, sale and distribution of building construction material such as formties, screw anchors, timber clamps, locks and ty-frames, employing approximately sixty-five (65) employees in the production of such articles, substantial quantities of which petitioner produces for interstate commerce; that petitioner has violated and is violating the provisions of Sections 7 and 15(a)(2) of the Act in that it has failed to compensate its employees at the rate of not less than one and one-half times their regular rates of pay for work in excess of forty hours a week, the statutory maximum workweek prescribed by the Act; that petitioner has violated and is violating the provisions of Section 15(a)(1) of the Act in that it has repeatedly shipped in interstate commerce goods in the production of which many of its employees were employed in violation of Section 7 of the Act (10-17).*

Issue was joined with the filing of the petitioner's answer on September 11, 1943, which, in substance, denies all of the material allegations of the complaint, sets up the affirmative defenses "that the complaint fails to state a claim against defendant upon which relief can

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* Unless otherwise indicated numerals in parentheses are inclusive and refer to folios of the record on this appeal before the Circuit Court.

be granted", and that Sections 6 and 7 of the Act are inapplicable to employees who "were and now are employed by defendant in executive or administrative capacities" (19-21).

The issues in the case were narrowed at a pre-trial conference (6 W. H. Rept. 1143), at which it was agreed that the sole issue was whether appellant violated the provisions of the Fair Labor Standards Act in failing to include certain bonus payments made by it to its employees in computing employees' regular rates of pay under the overtime provisions of the Act. The defense set up in the answer that the Act was inapplicable to employees of the defendant who were employed in executive or administrative capacities was disposed of by the Court's order that the appellant deliver to the plaintiff a list showing the names of all of its employees during the period from May 1, 1942 to August 4, 1943 and that the appellee after receipt of that list, advise the appellant which of the employees listed were exempt from the provisions of Sections 6 and 7 of the Fair Labor Standards Act of 1938. Both sides have complied with the order of the Court in this respect, and the exemption question was removed as an issue in this case.

In addition, the petitioner, by stipulation dated June 13, 1944, agreed that all of its employees are, and at all times after May 1942 were, engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

Reasons for Granting the Writ

The Circuit Court has found that:

> "Although the employees knew they could not legally compel the company to make those payments, no one can doubt that the employees assumed that, in the

> normal course of events, the employees would receive them. That seems to us to be enough to constitute them part of 'the regular rate at which' the men were employed (Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419; Walling v. Helmerich & Payne, 323 U. S. 37). To be sure, the Supreme Court has not yet considered a bonus arrangement involving no contractual obligation: but, interpreting those decisions as best we can, their implication, coupled with the language of section 7 (a) (3), seems to us to require the conclusion we have reached. We agree with the district judge that the 'good faith' of the employer is immaterial."

Your petitioner respectfully submits that the Circuit Court's conclusion as to the employee's expectations is gratuitous, erroneous, and in any case an unsatisfactory standard by which to measure liability for more than the agreed, regular rate of pay.

Moreover, the payments involved were not within the meaning of Section 7, because they were wholly voluntary, and, because they were not part of the "regular" rate of pay so as to be capable of anticipation or ascertainment before they were actually made. They were not part of the usual, ordinary or normal conditions of the wage contract. Whatever the motivation for the payments the record shows they were purely voluntary with the employer (297-302). Since these payments were concededly voluntary it was improper to force petitioner, by injunction, to continue making them.

The Circuit Court recognized that it was treating with "* * * a bonus arrangement involving no contractual obligation * * *", but it has created a new liability by judicial fiat which is not covered by either the letter or the spirit of Section 7 (a) (3) of the Act. In doing so it has de-

cided an important question of federal law which has not, but which should be settled by this court for these special and important reasons:

(1) It involves the extent of overtime pay which employees may seek to recover under thousands of similar bonus arrangements, and thus affects the weekly earnings of millions of employees;

(2) Unless corrected, the decision will tend to stifle a current trend among employers to share profits with employees by way of either bonus or other profit-sharing discretionary, unilateral arrangements.

(3) A decision by this court will help to avoid confusion in the formulation and application of bonus plans and help to shape and guide future policies throughout the United States for employers and employees alike;

(4) A decision by this court will authoritatively settle the law for the United States.

For the reasons stated in the accompanying brief, your petitioner believes that the rights of employer and employee covered by the Act do not automatically make any gift from the employer, even if paid at stated weekly intervals, a part of the regular rate of pay, and that the decision of the Circuit Court below is erroneous.

WHEREFORE, your petitioner respectfully requests the issuance of a Writ of Certiorari.

Dated, May 31, 1946.

Respectfully submitted,

E. JOHN ERNST, JR.,
Counsel for Petitioner.

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PETITIONER'S BRIEF

POINT I

The payments in issue were not part of the r rate of pay.

The basic issue in this case is one of law. A su judgment was granted to the Government upon the that the bonus payments were part of the base a matter of law, irrespective of whether they w tended as a gift. Unless this court can sustain th concept, in principle, there should be a reversal.

The decision of the District Court Judge was upon the premise that only a question of law volved, for he declared in his opinion: "I do one moment believe that the defendant intended, bonus system, to circumvent the Fair Labor St

Act. I hold merely that overtime must be paid on the basis of the regular compensation actually received by the employee, regardless of what the components of that actual compensation are called, and no matter how desirable and beneficial, or even praiseworthy it may be to divide the regular and actual compensation into components artificially for purpose of the Statute though perhaps real enough for other purposes" (354-355).

The immediate question presented then is whether war bond and war stamp gifts from an employer to an employee must be included as part of an employee's regular rate of pay in computing overtime pay under the Act. The ultimate question is whether an employer may contract with his employees in such a way as not to come into conflict with the provisions of the Act. Does the law impose a restraint on employer and employee, and necessarily upon their contract, which goes to the elements of the contract relation? Your petitioner believes that the Act was not designed to impair freedom of action or freedom of contract, and that an employer is required to do no more than to honestly pay the minimum wage and overtime earned by an employee.

When the Act was first enacted, cases arose in which employers either alone or in collusion with their employees set up fictitious standards to avoid the overtime provisions. An illustration is the Carleton case (126 Fed. 2nd 537) where the court said that the "entire purpose of the plan was to escape paying overtime on the basis of that rate. The bonus has none of the earmarks of a bonus, *but it was in fact a part of the employee's regular compensation. Neither the employer nor the employee regarded this payment as a gift or gratuity*". (Emphasis supplied.) The distinction seems to be that if a payment is honestly intended as a gift, it is not to be included in base pay (*Corey* v. *Detroit Steel*, 52 F. Supp. 138) because the term "regular rate" means no more than

the honest agreed price above the minimum provided by the Act.

The primary and most authoritative nuclear interpretations of the statutory phrase "regular rate" is found in this premise, in *Walling* v. *Belo*, 316 U. S. 624:

> "* * * it is agreed that as a matter of law the employer and employee may establish the regular rate by contract" (p. 631).

Respondent's seemingly unjustified apprehensions over what may eventuate and not the facts of this case have led him to unjustly insist on a swollen "regular rate" in this case. He says that:

> "By the simple device of an agreement with his employees that part of the employees' compensation is the 'regular rate of pay' and that the remainder is a bonus, Section 7 of the Act could be rendered entirely nugatory. That is precisely what was done in this case. The firm agreed that each of the employees' regular rates of pay was salary divided by 40 hours with overtime at time and one-half that rate and, in addition, the firm paid a bonus each week of 10 percent of the salary for the first 40 hours" (p. 21 of brief in District Court)."

But this is simply not true of this case. There is no such agreement.

All relevant cases establish the rule; that all devices are bad which maintain the pre-statutory rate by reshuffling the method of pay without the consent of the employees, usually by the service or posting of a one-sided notice by the employer. But it is respectfully suggested that where the employer intends to make a gift which is regarded and accepted as such by the employee, there is no violation of the Act. The "regular rate" is an ascertain-

able fact according to the circumstances of each case, and since each case depends for determination upon its own facts, the danger of widespread frustration of the Act is negligible.

Granted that it is the duty of the courts to give effect to Congressional intention, and granted further that Congressional intention must be regarded as paramount if conflict exists, there is nothing in the facts of this case which indicate the existence of any conflict. If there was, in this case any conflict as to the character of the "bonus" payments the Court's below were not warranted in their summary determination.

It can hardly be said that a unilateral determination to make gifts in the form of War Bonds for so long as the defendant found it desirable to do so can be characterized as an agreement rising to the dignity of a contract. Employer and employee understood that the gifts were not to be constant. It was not possible to ever say in advance if they would be forthcoming the following week. And thus they were not "regular" or ascertainable in the statutory sense. A mere resolution by a board of directors does not give an employee a vested right. The resolution can be rescinded at any time before performance without liability and certainly imports no continuity of liability for similar gift or gifts.

In the case at bar, if there is any fact which stands out without contradiction, it is that the employer intended to make a gift of War Bonds to the employees and that the employees understood that they were accepting a gift of War Bonds. Any theory of a contractual obligation, express or implied, is completely negatived by the declarations of both employer and employees (311-315), and the finding in the opinion of the Circuit Court (page 138).

This case is different from all others in that the fact that both employer and employee were and are honestly in accord on the completely gift character of the transactions. In the absence of such a bilateral admission of a mutual understanding, there might be some basis for the inference that there was an implied contractual obligation on the part of the employer to continue the payments, but, in the presence of that bilateral understanding that a gift was intended and performed, all other factors become subordinate to the paramount intention of the parties. The basic purpose is what controls and not the method of execution adopted, and certainly the administrator cannot create a new legal obligation merely by interpreting the statute in a manner incompatible with its plain words. Cf. W. & H. Release No. R-1548 and R-1548 (a) Sept. 2, 1941.

The determinations below have seemingly arisen from an excess of caution, probably inspired by the numerous decisions which declare the overriding public purpose in forbidding release or compromise of bona fide claims.

Since it is conclusively demonstrated that the payments here were gifts or gratuities, they need not be included in computations of the regular rate of pay. If the employee had a right by contract, express or implied, to a payment, then such payments could not be considered as gifts.

As the law is now stated, there cannot be an accord between an employer and an employee on what is the regular rate because in that way the employee may be contracting away a right that he has under the statute. This proposition would assume importance only if the underlying accord on the nature of the transaction, whether contract or otherwise, were unreal or dishonest or evasive or calculated to perpetuate the pre-statutory wage rate. This is always a question of fact. It does not apply here because the District Judge found that "I do not

for one moment believe that the defendant intended by its bonus system to circumvent the Fair Labor Standards Act" (fol. 354).

The overriding public interest does not require us to destroy the plain facts that we are not here confronted with a fictitious accord such as those interdicted by the authorities but rather a common understanding as to the gift character of the "bonus" payments, unless of course it can be said to be a fatally suspicious circumstance to find employer and employee agreeing on something.

The Circuit Court also meaningfully notes that petitioner treated the bonus payments as wages for social security and withholding tax purposes. This is required, irrespective of whether the bonus is the annual or Christmas type bonus, which the Administrator's regulation specifically exempts, or any other type of bonus. Cf. *Walling* v. *Garlock Packing Co.*, So. Dist. N. Y., May 3, 1946, 11 Labor Cases, 63, 146. Therefore, the inference which the Circuit Court drew from those acts is unsupportable.

It is a fundamental rule of statutory construction that where acts, lawful in themselves, may be reconciled within the framework of the statute, the court will always endeavor to do so rather than to declare such acts unlawful or mischievous. The Circuit Court has improperly concluded that the regular rate was fixed in a wholly unrealistic and artificial manner so as to negate the statutory purposes, and cites *Walling* v. *Helmerich & Payne* and *Walling* v. *Youngerman-Reynolds Hardwood Co.* to justify their conclusion. But there is nothing in those cases to justify the assumption that the bonus in this case was either unrealistic or artificial.

The method of determining the regular rate is stated very simply in *Walling* v. *Belo.* It is also stated in *Walling* v. *Youngerman-Reynolds Hardware Co., Inc.*, 325 U. S. 419, where this court wrote that "The regular rate by its very

nature must reflect all payments which the parties have *agreed* shall be received regularly during the work week * * *. It is an actual fact." (Emphasis supplied.) In following the precepts there provided, it is reasonable to conclude that the statutory phrase "regular rate" is synonymous with the agreed or contract rate, which, incidentally, is in this case also the real rate. In the presence of the finding that an honest contract rate exists, it was improvident of the Circuit Court to grant an injunction which, in legal effect, operates to compel the employer to continue the concededly voluntary bonus payments.

CONCLUSION

The writ of certiorari should be granted.

Dated, New York, May 31, 1946.

Respectfully submitted,

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Counsel for Petitioner.

JULIUS L. GOLDSTEIN,
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